Admin. October 22, 2008

Memorandum 2008-40

New Topics and Priorities

Each fall, the Commission reviews its current program of work, determines what its priorities will be for the next year, and decides whether to request that topics be added to or deleted from its legislatively enacted Calendar of Topics Authorized for Study ("Calendar of Topics").

To those ends, this memorandum summarizes the status of topics that the Commission is actively working on, topics that the Legislature has directed the Commission to work on, topics that the Commission has previously expressed an interest in working on, and new topics that have been suggested in the last year. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting.

The following letters, email communications, and other materials are attached to and discussed in this memorandum:

COMMISSION AUTHORITY

The Commission's enabling statute recognizes two types of topics the Commission is authorized to study: (1) those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and (2)

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

those that the Legislature assigns to the Commission directly, by statute or concurrent resolution. Gov't Code § 8293.

In the past, the bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. Once the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments have become much more common in recent years. Many of the Commission's recent studies were directly assigned by the Legislature, not requested by the Commission.

CURRENT LEGISLATIVE ASSIGNMENTS

There are a number of topics that have been specifically assigned by statute or resolution. They are described below.

Donative Transfer Restrictions

In 2006, the Commission was directed by the Legislature to study the operation and effectiveness of Probate Code provisions that create a presumption of menace, duress, fraud, or undue influence when a gift is made to certain specified types of persons. 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)). **The Commission has nearly completed this study, with its final report due by January 1, 2009.**

Deadly Weapons

Another 2006 bill directed the Commission to study the statutes relating to control of deadly weapons. 2006 Cal. Stat. res. ch. 128, (ACR 73 (McCarthy)). The objective is to propose legislation that will clean up and clarify the statutes, without making substantive changes. **The Commission is on track to complete this large study before its due date of July 1, 2009.**

Attorney-Client Privilege After Client's Death

A 2007 bill directed the Commission to study "whether, and if so, under what circumstances, the attorney-client privilege should survive the death of the client." 2007 Cal. Stat. ch. 388, § 2 (AB 403 (Tran)). **The Commission is on track to complete this study before its due date of July 1, 2009.**

Trial Court Unification

Government Code Section 70219 directs the Commission and the Judicial Council to study certain topics identified in the Commission's report on *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

The Commission has completed work on all but one of the topics for which it has primary responsibility. The remaining topic is publication of legal notice in a county with a unified superior court. The Commission has been deferring work on that study until interested parties gain experience with legal publication in a unified superior court.

The Commission's report also called for a joint study with the Judicial Council reexamining the three-track system for civil cases (traditional superior court cases, traditional municipal court cases, and small claims cases) in light of unification. The Commission has done much work along those lines, including two projects that have been completed:

- A joint study on *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*, 30 Cal. L. Revision Comm'n Reports 443 (2000). The proposed legislation was enacted as 2001 Cal. Stat. ch. 812.
- A joint study on the jurisdictional limits for small claims cases and limited civil cases. For a number of reasons, the Commission decided not to issue a final recommendation in this study.

The Commission also did extensive work on two other projects:

- **Appellate and writ review under trial court unification.** After circulating a tentative recommendation in 2001, the Commission discontinued work on this project due to state budgetary constraints on court operations. The Commission's intent was to revisit the matter when the state budget improved.
- **Equitable relief in a limited civil case.** The Commission issued a tentative recommendation on this topic in 2005. In light of the comments on the tentative recommendation, the Commission decided to take a broader view of the role of the limited civil case in the unified court system, before determining whether to proceed with the proposal. Matters to be reviewed include the number of limited civil cases filed, the cost of economic litigation procedures compared with the costs of unlimited civil case litigation, the satisfaction level of the courts with the limited civil case system, and the approach taken in other jurisdictions that have a unified court system. The staff made efforts to find a

consultant to prepare a background study, but no consultant was hired.

Neither of these topics would be appropriate to pursue while the state budget is shaky and the Commission has no funds to hire a consultant.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform). See Gov't Code § 71674. In response to this directive, four substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149; 2007 Cal. Stat. ch. 43; 2008 Cal. Stat. ch. 56.

Other issues still require study; some issues are not yet ripe for consideration. **The Commission should continue its work in this area.**

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from time to time under this authority. Debtor-creditor technical revisions were enacted on Commission recommendation in 2002.

Code of Civil Procedure Section 703.120(a) requires the Commission to review the statutory exemptions from enforcement of money judgments, and recommend any changes in exempt amounts that appear proper, every ten years.

In 2003, the Commission completed its second decennial review of these exemptions. Legislation recommended by the Commission was enacted. See 2003 Cal. Stat. ch. 379. The third decennial review will be due in 2013.

No new action on this topic is required at this time.

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature. Gov't Code § 8298. The Commission exercises this authority from time to time.

No new action on this topic is required at this time.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily propose legislation to effectuate these recommendations.

No new action on this topic is required at this time.

NEW LEGISLATIVE ASSIGNMENTS

There were no new legislative assignments enacted in 2008.

CALENDAR OF TOPICS

This section of this memorandum reviews the status of matters listed in the Commission's Calendar of Topics, which currently includes 22 topics. See 2007 Cal. Stat. res. ch. 100. A precise description of each topic is attached to this memorandum as Exhibit pp. 1-3. On a number of the listed topics, the Commission has completed work, but the topic is retained in the Calendar in case corrective legislation is needed in the future.

Below is a discussion of each topic in the Calendar. The discussion indicates the status of the topic, and any need for future work.

1. Creditor's Remedies

Beginning in 1971, the Commission has made a series of recommendations covering specific aspects of creditor's remedies. In 1982, the Commission obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of this statute, the Commission has submitted a number of narrower recommendations on this topic to the Legislature.

Possible subjects for study under this topic are discussed below.

Judicial and Nonjudicial Foreclosure of Real Property Liens

The Commission has recognized that foreclosure is a topic in need of work. Nevertheless, the Commission has consistently deferred undertaking a project on

this subject, because of the magnitude, complexity, and controversy involved in that area of the law.

In recent years, the Commission has received suggestions from a number of sources regarding foreclosure procedure, including several suggestions from Commission member Ed Regalia. See CLRC Memorandum 2006-36, pp. 21-22 & Exhibit pp. 44-60; CLRC Memorandum 2005-29, p. 20; CLRC Memorandum 2002-17, p. 5 & Exhibit p. 47; CLRC Memorandum 2001-4, Exhibit pp. 1-2.

Pursuant to a Commission directive, the staff has also been monitoring developments relating to the bad faith waste exception to the antideficiency laws (which preclude some creditors from seeking a deficiency judgment when the sale price of a foreclosed property is insufficient to fully satisfy the debt for which the property was security). See CLRC Minutes (November 2002), pp. 3-4.; *Nippon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001); see also Miller, Starr & Regalia, California Real Estate *Deeds of Trust* § 10:217, at 720-22 (2003 update) & 15-16 (2007 Supp.). There do not appear to have been any significant new developments in this area in the past year.

Given the current foreclosure-related economic crisis, it seems likely that the Legislature will be looking closely at a number of foreclosure law reforms. It would be best to wait for that process to play out. **It would therefore not appear to be a good time to commence a study of this subject, unless the Legislature directs the Commission to conduct such a study.**

Assignments for the Benefit of Creditors

In 1996, the Commission decided to study whether to codify, clarify, or change the law governing general assignments made for the benefit of creditors. The Commission indicated that such a study might also include consideration of whether or how this procedure might be applied to a reorganization or liquidation of a small to medium sized business.

A general assignment for the benefit of creditors is a largely common law cooperative procedure in which an insolvent debtor assigns his or her assets to an assignee, who then distributes the assets to the debtor's creditors in some pro rata fashion. It is typically used as an alternative to a bankruptcy proceeding.

The Commission hired attorney David Gould of Los Angeles to prepare a background study on this topic. Mr. Gould has just provided the staff with a rough draft of his report.

The staff will work with Mr. Gould to finalize his report. It may be ready for consideration in connection with next year's discussion of new topics.

2. Probate Code

The Commission drafted the current version of the Probate Code in 1990. The Commission continues to monitor experience under the code, and make occasional recommendations.

Possible subjects for study under this topic are discussed below.

Creditor's Rights Against Nonprobate Assets

A nonprobate transfer passes property outside the probate system. As the use of nonprobate transfers in estate planning has increased, the proper treatment of a decedent's creditors has emerged as a major concern. The Commission recently examined such issues in the context of a revocable transfer on death deed. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 185-91 (2006).

The Commission has not addressed the treatment of a decedent's creditors in the context of other types of nonprobate transfers, such as a revocable trust. The Uniform Probate Code now has a procedure for dealing with this matter. When resources permit, this will be an important topic for the Commission to take up. See Hartog & Schenone, *Alice in Tulsa-land: The* Dobler *Effect on Creditors of Revocable Trusts*, Cal. Trusts & Estates Q. 4 (Summer 2004); CLRC Memorandum 2004-35, p. 5.

In October 2007, the Commission accepted an offer from the Commission's former Executive Secretary, Nathaniel Sterling, who has extensive expertise in this area, to prepare a background study on this topic. **Mr. Sterling estimates that the study will take approximately two years to complete.**

Application of Family Protection Provisions to Nonprobate Transfers

Should the various family protections applicable to an estate in probate, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? This is another important area that the Commission is well-suited to study. Again, the Commission recently considered such issues in the context of a revocable transfer on death deed. See *TOD Deed*, *supra*, 36 Cal. L. Revision Comm'n Reports at 182-85. However, the Commission determined at

that time that "the problem should be addressed globally, not in the context of an individual type of nonprobate transfer instrument." *Id*. at 185.

The background study Mr. Sterling is preparing will also address this topic.

Uniform Trust Code

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated a Uniform Trust Code in 2000. The Reporter for the Uniform Trust Code, Prof. David English of the University of Missouri Law School, thereafter began preparing a report on how California law compares with the Uniform Trust Code.

The Commission originally funded Professor English's work, but had to cancel the contract due to budget cuts. Fortunately, the State Bar Trusts and Estates Section agreed to fund the research instead.

When the report is completed, the staff will include this matter in the discussion of possible new topics.

Uniform Custodial Trust Act

In 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act.

California has not yet adopted the Uniform Custodial Trust Act, so the matter remains an appropriate topic for study.

Interest on a Pecuniary Gift in a Trust

In 2005, the Commission decided to study a narrow issue relating to interest on a pecuniary gift in a trust, on a low priority basis. The issue involved Probate Code Section 16340, which was drafted by the Commission. See CLRC Minutes (September 2005), pp. 3-4; CLRC Memorandum 2005-29, p. 22 & Exhibit pp. 37-41.

This issue appears to have been adequately addressed by subsequent legislation. See 2006 Cal. Stat. ch. 569 (AB 2347 (Harman)). **Unless the Commission directs otherwise, the staff will remove this topic from further consideration.**

3. Real and Personal Property

The study of property law was authorized by the Legislature in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Possible subjects for study under this topic are discussed below.

Mechanics Lien Law

In 2008, the Commission recommended a complete recodification of mechanics lien law. A bill implementing the Commission's recommendation, SB 1691 (Lowenthal), was approved by the Legislature, but was vetoed by the Governor (based on timing issues relating to the 2008 state budget). That recommendation may be reintroduced in the Legislature in 2009. See CLRC Memorandum 2008-44.

In preparing its 2008 recommendation in this matter, the Commission deferred consideration of several possible substantive improvements to existing mechanics lien law. The Commission's overall view was that these proposals were better addressed after a reorganization of the existing statute had been enacted. They could then be considered in the context of the recodified statute.

These suggestions included:

- Clarify the application of mechanics lien law to "hybrid" projects (improvements to publicly owned property that are contracted for by private developers).
- Clarify the application of mechanics lien law to persons that provide work after "completion" of a work of improvement.
- Clarify the rights and responsibilities of multiple owners of a single improvement (including successive owners while construction is ongoing).
- Clarify the application of mechanics lien law to common area within a common interest development.
- Study the feasibility of a cause of action for damages or other statutory consequence to deter the recording of a false claim of lien.
- Study whether lien rights should be assignable.
- Study whether a "substantial compliance" provision should be applicable to mechanics lien notices, to excuse minor formal errors in notices.
- Study whether to allow a surety that has provided a payment bond on a project to give a stop payment notice.

- Add detail to the security requirements applicable to an owner of specified large projects.

If the nonsubstantive recodification of mechanics lien law is reintroduced in 2009, **these new proposals should continue to be put on hold**. It would be unnecessarily complicated to develop new reform proposals while the recodification bill is being considered.

Inverse Condemnation

In 1997, the Commission decided to consider exhaustion of administrative remedies in inverse condemnation. The project was contingent on obtaining a background study on the subject, which it now appears the Commission will not receive.

Unless the Commission directs otherwise, the staff will remove this topic from further consideration.

Adverse Possession of Personal Property

In 1992, the Commission submitted to the Legislature a recommendation relating to quieting title to personal property. See CLRC Memoranda 1992-47, 1993-26. If implemented, the recommendation would have amended Civil Code Sections 1005-1007 to explicitly provide that title to personal property could be acquired by adverse possession.

Based on objections to the recommendation submitted by the State Bar Committee on Administration of Justice, however, the Commission's recommendation was withdrawn for reconsideration. Thereafter, the matter was assigned a low priority, and no further work has been done.

Unless the Commission directs otherwise, the staff will remove this topic from further consideration.

Severance of Personal Property Joint Tenancy

In 1983, the Commission submitted to the Legislature a recommendation relating to the severance of a joint tenancy in either real or personal property. See 17 Cal. Law Revision Comm'n Reports 945 (1984). In the Legislature, the legislation implementing the recommendation was amended to apply only to a joint tenancy in real property. See 1984 Cal. Stat. ch. 519, Civ. Code § 683.2.

The issue of a severance of a joint tenancy in personal property remained with the Commission as a topic for future consideration, on a low priority basis. However, no significant work has been done on the topic since then.

Unless the Commission directs otherwise, the staff will remove this topic from further consideration.

Environmental Covenants and Restrictions

In 2000, the Commission decided to study an issue relating to environmental covenants and restrictions, as a low priority matter. Public agencies often settle concerns over contaminated property, environmental conservation, and other land use matters by requiring the recording of certain covenants and restrictions relating to use of the land. Such settlements are based on the assumption that the recording of the covenants and restrictions makes them binding on successors in interest in the property.

At the time the Commission decided to study this issue, it was not entirely clear that these covenants would "run with the land," and be enforceable against successive owners of the land. The concern was that they would not meet the criteria provided in Civil Code Section 1468.

It now appears that the issue has been adequately addressed. Civil Code Sections 815 *et seq.* provide for enforceable "conservation easements" that run with the land, and Section 1471 authorizes environmental covenants relating to land that has been contaminated with hazardous materials.

Unless the Commission directs otherwise, the staff will remove this topic from further consideration.

Eminent Domain

In 2000, as part of a recommendation on *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain*, 30 Cal. L. Revision Comm'n Reports 567 (2000), the Commission proposed the enactment of Code of Civil Procedure Section 1260.040. The section was intended to provide an opportunity, well before trial, to litigate in limine matters relating to the appropriate amount of compensation in an eminent domain action, in order to facilitate resolution of such cases without trial:

> 1260.040. (a) If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court

> for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.
>
> (b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an eminent domain proceeding, the court may postpone those dates for a period sufficient to enable the parties to engage in further proceedings before trial in response to its ruling on the motion.
>
> (c) This section supplements, and does not replace any other pretrial or trial procedure otherwise available to resolve an evidentiary or other legal issue affecting the determination of compensation.

In 2005, Michael Montgomery advised the Commission that public entities were using Section 1260.040 as a vehicle for seeking a complete dismissal of inverse condemnation actions, by asserting that the language of the section authorized a court to rule on all contested legal issues in the action. See CLRC Memorandum 2005-29, pp. 24-25, and Exhibit pp. 65-66. Mr. Montgomery pointed out that public entities were effectively seeking summary judgment in these matters at a hearing that did not afford the procedural protections normally available when a summary judgment motion is made (e.g., an expanded briefing schedule).

The Commission decided to study the issue. However, in 2006, the Commission decided to defer work on the study, as a bill directing the Commission to conduct a broader review of eminent domain law was pending in the Legislature (AB 1162 (Mullin)). That bill was not enacted.

In June 2007, a California Court of Appeal issued a published opinion applying Section 1260.040 in an inverse condemnation action and permitting its use to determine whether the state was liable. *Dina v. People ex rel. Dept. of Transp.*, 151 Cal. App. 4th 1029, 60 Cal. Rptr. 3d 559 (2007). (Mr. Montgomery was counsel for the appellant in that case.)

Having reviewed that case, the staff sees no defect in Section 1260.040. The Commission's recommendation on *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain* makes clear that the purpose of the provision is limited to the resolution of disputes involving the amount of compensation owed *in an eminent domain action*. That limited application is stated expressly in a Comment to an introductory provision of the Eminent Domain Law: "The provisions of the Eminent Domain Law are intended to supply rules

only for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development." Code Civ. Proc. § 1230.020, Comment.

To the extent that there is any problem interpreting Section 1260.040, it results from the court's decision to apply Section 1260.040 in an inverse condemnation case, and adapt its meaning to that context. That result is not compelled or suggested by the Commission's recommendations on eminent domain. Rather, the choice to adapt Section 1260.040 for use in inverse condemnation could be understood as an example of judicial development of the law governing inverse condemnation.

If the court had misconstrued Section 1260.040 *as it applies to eminent domain*, the Commission would be justified in seeking to clarify the intended meaning of the provision. Here, the court appears to be making new law with respect to inverse condemnation procedure. To evaluate the merits of the court's decision, the Commission would need to conduct a study of the procedures used in inverse condemnation generally, a potentially large and complex topic.

The staff recommends against taking any action on this matter at this time. However, the staff will watch the development of this issue, to see whether it leads to misunderstanding of the operation of Section 1260.040 in an eminent domain proceeding.

4. Family Law

The Family Code was drafted by the Commission in 1992. Since then, the general topic of family law has been continued on the Commission's agenda for ongoing review.

Possible subjects for study under this topic are discussed below.

Marital Agreements Made During Marriage

California has enacted the Uniform Premarital Agreements Act, as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues.

If the Commission decided to undertake such work, it could also consider clarifying certain language in Family Code Section 1615, governing the enforceability of premarital agreements. See CLRC Memorandum 2005-29, p. 25

& Exhibit pp. 21-36. In particular, the Commission could study circumstances in which the right to support can be waived. See *In re Marriage of Pendleton and Fireman*, 24 Cal. 4th 39, 5 P.3d 839, 99 Cal. Rptr. 2d 278 (2000).

This topic may be an appropriate matter for the Commission to study in the future. However, the staff believes **it would be too complex and controversial a study to commence at this time, in light of limited staff resources.**

5. Offers of Compromise

In 1975, the topic of offers of compromise was added to the Commission's Calendar of Topics, at the request of the Commission. The Commission was concerned with Code of Civil Procedure Section 998, which calls for an adjustment of costs following the rejection of an offer of compromise in civil litigation. The Commission noted ambiguity in the language of the section, suggesting it did not deal adequately with the problem of a joint offer to several plaintiffs.

That issue has now been substantially addressed by case law. See cases collected in *Peterson v. John Crane, Inc.*, 154 Cal. App. 4th 498, at 505, 65 Cal. Rptr.3d 185 (2007). **Unless the Commission directs otherwise, the staff will remove this specific topic from further consideration. The Commission may also wish to request the removal of this topic from its Calendar of Topics, as no other study suggestions have been made that would fall under this authority.**

6. Discovery in Civil Cases

The Commission has been actively studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. A number of reforms have already been enacted, most recently the Commission's recommendation on *Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99 (2007). No new proposal is in progress at this time.

The Commission has received numerous suggestions from interested persons, and has also identified other topics to address. Thus far, the focus has been on relatively noncontroversial issues of clarification. This approach has been successful and may be more productive than investigating a major reform that might not be politically viable.

Due to staffing considerations, it appears necessary to defer further work on this study until after completion of the deadly weapons study. At that time, we can assess which discovery topic to pursue next.

However, one point can be resolved now. In 1995, the Commission decided to investigate discovery of computer records. The staff has been following developments in this area, which has received extensive attention in the federal court system and from national organizations such as the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

This year, the Judicial Council, the Consumer Attorneys of California, and California Defense Counsel co-sponsored a bill (AB 926 (Evans)) to amend the Civil Discovery Act to better provide for discovery of electronically stored information. The bill passed the Legislature without a single "no" vote, but was vetoed by the Governor due to the budget delay and his policy of "only signing bills that are the highest priority for California."

Presumably, the same bill will be reintroduced next year. In light of that anticipated legislation, as well as the cooperative efforts of the co-sponsors to effectively address electronic discovery, the staff recommends that **the Commission leave that topic alone and focus its efforts on other aspects of civil discovery.**

7. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for different types of public improvements. The statutes overlap, duplicate each other, and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980, with the objective that the Commission might be able to develop one or more unified statutes to replace the variety of specific statutes that now exist.

The Commission has not commenced work on this study, and since it was first authorized, has not heard of any serious problems caused by the existing multiplicity of special assessment statutes. While development of a unified statute would probably be worthwhile, it would involve mostly non-substantive recodification on a large scale. Recent experience shows that projects of that sort can take years to complete and can be unexpectedly difficult to successfully enact.

In light of other demands on Commission and staff resources, **the staff does not recommend that the Commission undertake this project at this time**.

8. Rights and Disabilities of Minor and Incompetent Persons

Since authorization of this study in 1979, the Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons. There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case such a proposal is presented in the future.**

9. Evidence

The Evidence Code was enacted in 1965 on recommendation of the Commission. Since then, the Commission has had continuing authority to study issues relating to the Evidence Code. The Commission has made numerous recommendations on evidence issues, most of which have been enacted.

In the past year, the Commission has worked on two evidence projects assigned by the Legislature. The Commission completed its study of two hearsay exceptions (forfeiture by wrongdoing and present sense impressions) by the statutory deadline of March 1, 2008. It is now working on a study of the attorney-client privilege after the client's death, which is due by July 1, 2009 (see 2007 Cal. Stat. ch. 388). The Commission has given that study priority and should continue to do so until it is completed.

The Commission has on hand an extensive background study prepared by Prof. Miguel Méndez of Stanford Law School, which is a comprehensive comparison of the Evidence Code and the Federal Rules of Evidence. The Commission began to examine some topics covered in the background study, but encountered resistance from within the Legislature and suspended its work in 2005.

The staff later compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial. See CLRC Memorandum 2006-36, Exhibit pp. 70-71. The Commission directed the staff to seek guidance from the Judiciary Committees regarding whether to pursue those issues. The staff explored this matter to some extent, without a clear resolution. **Unless the Commission otherwise directs, we will raise the matter with the Judiciary Committees again, when it appears appropriate.**

10. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961, on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics in case such a proposal is presented in the future.**

11. Administrative Law

This topic was authorized for Commission study in 1987, both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics, in case any adjustments are needed in the laws enacted on Commission recommendation.**

12. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988, pursuant to a suggestion of the California Judges Association ("CJA"). The staff did a substantial amount of preliminary work on the topic in 1990, but the work was suspended pending guidance from CJA on specific problems requiring attention, which were never identified.

In 1999, the Commission began studying one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission considered a number of issues and drafts, but had to put the matter on the back burner due to other demands on staff and Commission time.

The Commission has also considered studying the possibility of standardizing various attorney's fee statutes.

This topic might be appropriate for study at some time in the future, but is not a good fit with staff resources at present.

13. Uniform Unincorporated Nonprofit Association Act

In 1993, the Commission was authorized to study whether California should enact the Uniform Unincorporated Nonprofit Association Act. The Commission

ultimately decided not to recommend enactment, but made other recommendations to clarify the status and governance of unincorporated associations, which were enacted.

There are no active proposals relating to this topic before the Commission at this time. **However, the topic should be retained on the Calendar of Topics in case issues arise relating to provisions enacted on its recommendation**.

14. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have since been enacted.

Two projects in this area have also been directly assigned by the Legislature. They are discussed under "Current Legislative Assignments," above.

15. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, which includes a study of the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

In this regard, the staff have been monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"). California enacted a version of UETA in 1999. Civ. Code §§ 1633.1-1633.17. However, in 2000, related federal legislation was enacted, the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). 15 U.S.C. 7001-7006, 7021, 7031.

The interrelationship of the two legislative acts is complex, but it appears E-SIGN may preempt at least some aspects of state UETA law. As yet, the courts have not resolved this complicated issue.

The staff will continue to monitor this situation, but does not recommend commencing a project in this area until the courts have offered more guidance on the preemption issue.

16. Common Interest Developments

CID law was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission has been actively engaged in a study of various aspects of this topic since that time, and has issued several recommendations.

In 2003, the Commission considered whether the Uniform Common Interest Ownership Act ("UCIOA") should be adopted in California in place of the Davis–Stirling Common Interest Development Act. The Commission decided to recommend against adoption of UCIOA at that time, but may at some point reevaluate whether to recommend adoption of UCIOA. CLRC Minutes (Nov. 2003), p. 8.

In 2008, the Commission completed work on a proposed recodification of CID law. A bill that would have implemented the Commission's recommendation was introduced in 2008 (AB 1921 (Saldaña)), but both the bill and the Commission recommendation were withdrawn in order to allow for analysis of late-arising comment. That work is likely to continue in 2009, and will consume some staff resources.

In addition to continuing work on the recodification of CID statutory law, the Commission has expressed interest in starting work on new CID topics in 2009.

A catalog of potential new topics was presented in Memorandum 2008-28. Of the topics discussed there, the Commission expressed most interest in the concept of developing simplified governance procedures for very small homeowner associations. That project could be approached incrementally, as a series of narrowly focused reforms. That would make it easy to integrate into the Commission's workload, and would probably produce a series of discrete and enactable proposals. **The staff believes this would be a good topic for the Commission to commence work on.**

Another topic discussed in Memorandum 2008-28, which would be a good candidate for work in 2009, would be to clarify the application of the Davis-Stirling Common Interest Development Act in situations where its application is either inappropriate or unclear. For example, there are many parts of the Davis-Stirling Act that should probably not be applied to an association that is completely non-residential. Other issues include the application of the Davis-Stirling Act to a development with a road maintenance association but no "common area," a stock cooperative that does not have a recorded declaration, and an association that is organized as a for-profit corporation. These topics would also lend themselves to incremental segmentation.

The staff recommends that **the Commission authorize the topics above for active study in 2009, in which case the staff would work them into the agenda as resources permit.**

17. Statute of Limitations for Legal Malpractice

A number of years ago, the Commission did extensive work on the statute of limitations for legal malpractice. After circulating both a tentative recommendation and a revised tentative recommendation, the Commission decided that further work probably would be unproductive and discontinued the study without issuing a final recommendation. **The topic remains on the Commission's Calendar of Topics, in case future developments make it worthwhile to recommence work in this area.**

18. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important study, we have not given it priority. **In light of current limited Commission and staff resources, the staff does not recommend that the Commission undertake a project of this scope and complexity at this time.**

19. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission began work on this matter, but received negative input and the proposal was tabled.

In 2006, the Legislature directed the Commission to study and report on a nonsubstantive reorganization of the statutes governing deadly weapons, which includes criminal sentencing enhancements relating to the possession or use of deadly weapons. That study is now ongoing; the Commission's final report is due by July 1, 2009. See discussion in "Current Legislative Assignments," above. **In light of possible relevance to that study, it appears advisable that the Commission retain its existing authority to study criminal sentencing.**

20. Subdivision Map Act and Mitigation Fee Act

In 2001, a study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics, at the request of the

Commission. The objective of the study would be a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes.

This project would be a massive, mostly nonsubstantive recodification. As noted earlier, recent experience shows that such projects can take several years to complete and may not produce enactable legislation. **In light of current limited Commission and staff resources, the staff does not recommend that the Commission undertake this project at this time.**

21. Uniform Statute and Rule Construction Act

In 2003, a study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics, at the request of the Commission.

The Commission has previously indicated its intention to give this study a low priority. **The staff does not recommend that the Commission undertake this project at this time.**

22. Venue

In 2007, the Calendar of Topics was revised at the Commission's request, to add a study of "[w]hether the law governing the place of trial in a civil case should be revised." 2007 Cal. Stat. res. ch. 100.

In 2005, the Office of Legislative Counsel had alerted the Commission to a recent unpublished decision concerning venue issues. The Second District Court of Appeal had noted that Code of Civil Procedure Section 394, a venue statute, was a "mass of cumbersome phraseology," and that there was a "need for revision and clarification of the venue statutes." See CLRC Memorandum 2005-29, Exhibit p. 59. The Court of Appeal was sufficiently concerned about this matter to direct its clerk to send a copy of its opinion to the Office of Legislative Counsel. *Id*.

In alerting the Commission to the matter, the Office of Legislative Counsel said it would defer to the Commission's expertise "in determining whether a broader review of venue statutes is in order; however, a review of the present case and the prior reported cases does seem to indicate that Section 394 of the Code of Civil Procedure needs to be restructured." *Id*.

The Court of Appeal is correct in characterizing the existing venue statutes as cumbersome and confusing. Attempting to clean them up would be difficult but potentially worthwhile, because the statutes are so widely used.

The Commission should begin work in this area when its resources permit. **However, the staff believes commencement of a study at this time would be infeasible, due to current staffing considerations.**

CARRYOVER SUGGESTIONS FROM LAST YEAR

Last year, the Commission decided that several new suggestions should be retained for consideration this year. See CLRC Minutes (December 2007), p. 3.

Two of those suggestions are no longer relevant, as a result of subsequent events:

- The question of whether a TOD deed could be used by an owner of a stock cooperative was contingent on enactment of the Commission's recent TOD deed recommendation. That recommendation was not enacted. Consequently, there is no need to pursue this topic.
- A suggestion that Physician Orders For Life Sustaining Treatment (POLST) be adopted as official policy in California appears to have been independently addressed. See 2008 Cal. Stat. ch. 266 (AB 3000 (Wolk)).

The remaining suggestions carried over from last year are discussed below.

Licensing a Non-Resident as a Life Insurance Analyst

In 2007, the Commission decided that a narrow project on licensing a nonresident as a life insurance analyst might be undertaken in 2008, if time permitted.

California Insurance Code Section 1833 provides: "A license to act as a life insurance analyst shall not be issued to any person not residing in this state, nor to any person who is under 18 years of age at the time of application." In 2007, attorney Brenton Ver Ploeg wrote that the Department of Insurance had recently cited that statute in denying his non-resident client an opportunity to perform certain work for which a license is required. CLRC Memorandum 2007-48, Exhibit pp. 49-51.

Mr. Ver Ploeg requested that the Department "either act to license qualified non-residents or, in the alternative, provide ... a written explanation for what you

believe the rational basis is for this restriction so that the issue may be crystallized for further resolution." *Id.* at 50.

Mr. Ver Ploeg is correct in noting that occupational or professional residency requirements are probably unconstitutional. Most challenges to such requirements appear to have involved the Privileges and Immunities clause of the United States Constitution. U.S. Const., art. IV, § 2. In *Supreme Court of New Hampshire v. Piper*, 470 U. S. 274, at 284, 105 S. Ct. 1272 (1985), the court held that an occupational residency requirement violates the Privileges and Immunities clause unless the state can show a substantial reason for the requirement, and a substantial relationship between the requirement and the state's objective in enacting the requirement. A residency requirement might also implicate other constitutional issues, such as interstate commerce and the right to travel.

In addition to the licensing statute noted by Mr. Ver Ploeg, there are also other California occupational licensing statutes that require residency. See, e.g. Bus. and Prof. Code §§ 9700.5 (cemetery broker's license), 9723.1 (cemetery manager license), Ins. Code §1805 (bail license). If the Commission were to study the constitutionality of a residency requirement in licensing an insurance analyst, it would probably make sense to review all California residency requirements applicable to licensed professions.

Before commencing work on this topic, we would need to request authority to do so from the Legislature. **The Commission should decide whether it wishes to seek such authority.**

Issues Arising When Settlor of Revocable Trust Becomes Incompetent

A number of years ago, the Commission began investigating issues that arise when the settlor of a revocable trust (the person placing assets in the trust) allegedly becomes incompetent. See Prob. Code § 15800. The Commission tabled its work in 2000, in view of an "ongoing project to address these issues by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee." CLRC Minutes (June 2000), p. 12.

In 2005, the Commission received a request from John Beauclair to study certain points in this area. See CLRC Memorandum 2005-29, pp. 20-21 & Exhibit pp. 6-9. Mr. Beauclair noted that neither statute nor case law had yet addressed the following questions:

(1) When the settlor of a revocable trust allegedly becomes incompetent, does the trust then become irrevocable (even though

the settlor is still alive), or does it remain revocable (even though there would presently be no one with the power to revoke)?

(2) Is a judicial determination of competency necessary to determine whether a settlor of a trust has become incompetent, if the trust specifies another method of determining the settlor's competency?

We attempted to refer Mr. Beauclair's comments to the Trusts and Estates Section for consideration, but discovered that the Trusts and Estates Section was no longer studying the matter.

To our knowledge, no legislation on this topic has been enacted, and the area of law remains unsettled. This matter would fall within the Commission's authority to study the Probate Code. The staff recommends that **the Commission consider studying these issues in 2009.**

Renewal of Judgment

In connection with the Commission's prior study of *Enforcement of a Money Judgment Under the Family Code*, John Jones offered some technical suggestions relating to the procedure for renewal of a judgment. See Second Supplement to CLRC Memorandum 2005–37, Exhibit pp. 2-3. The suggestions relate to the assignment of case numbers, the effect of filing a renewed judgment, and the recordation of an application for renewal of a judgment.

Considering the Commission's existing authority to study the enforcement of judgments, the Commission could choose to study the technical issues raised by Mr. Jones.

Litigation Deadlines

In 2007, the Commission considered a suggestion related to litigation deadlines submitted by Richard Best, a former discovery commissioner for the San Francisco County Superior Court. Mr. Best noted that some litigation deadlines refer to court days, others refer to calendar days, and still others do not specify which type of days are to be counted. He suggested the possibility of establishing a default rule to apply in the latter situation.

It was not clear from Mr. Best's comments whether he was referring to civil litigation, criminal cases, or both. The problem to which he refers clearly exists in both types of cases, but probably should be examined separately in each context.

The general provisions in the Code of Civil Procedure governing computation of time (e.g., Code Civ. Proc. §§ 10, 12-13b) contain other ambiguities that may also warrant clarification.

Attempting codewide clean-up of the rules governing computation of time would be an ambitious and difficult project. On the other hand, well-crafted legislation would be very useful to the numerous people that are required to calendar deadlines on a daily basis.

This might be an appropriate project for the Commission to undertake when it has sufficient resources. However, before commencing any such study, the Commission would need to request authority from the Legislature to do so. **The Commission needs to decide whether it wishes to seek such authority.**

Electronic Transmission Of Instructions To Sheriff Or Marshal

In 2007, the Civil Committee of the California State Sheriffs' Association ("CSSA") suggested that the Commission study the possibility of amending Code of Civil Procedure Sections 262, 488.030, and 687.010 to accommodate electronic transmission of creditor's instructions to a sheriff or marshal. See CLRC Memorandum 2007-48, Exhibit pp. 4-5. The amendments proposed by the committee "would provide the Sheriff/Marshal the same protections from liability when the instructions from the creditor are received electronically, with no actual signature on paper form." *Id*. at 4. The amendments are modeled on recently adopted court rules on electronic filing (Cal. R. Ct. 2050-2060). *Id.*

The concept of revising these provisions to accommodate electronic transmission of instructions is clearly worthy of study and would be a suitable project for the Commission. However, further research and analysis would be required in order to determine whether the approach proposed by CSSA's Civil Committee — simply deeming electronic transmission to constitute an electronic signature — would be the best means of addressing the situation.

In addition, the suggestion raises questions about the proper treatment of other documents that may be submitted to state agencies electronically. It might be appropriate to study those issues at the same time as examining CSSA's suggestion.

If the Commission undertook a broad study of such issues, however, the study would take longer to complete than if the Commission focused narrowly on the three provisions included in CSSA's suggestion. CSSA warns that "conducting a comprehensive study of other documents that may be submitted to state agencies electronically ... would be an overwhelming, time-consuming task, that would include many more complex issues than the specific revisions we are suggesting." CLRC Memorandum 2007-48, Exhibit p. 6.

If the suggested study was limited to electronic transmission of instructions for levying on property, it would fall within the Commission's existing authority to study creditor's remedies and could be commenced at this time. If it was broadened into a general study of electronic transmission of documents to government agencies, it would arguably fall within the Commission's authority to study administrative law. **For a study of that magnitude, however, the staff would recommend that the Commission seek specific authority from the Legislature before commencing the work.**

Scheduling of an Administrative Hearing

In 2006, attorney Tom Lasken pointed out that the Office of Administrative Hearings ("OAH") often schedules an administrative hearing based solely on input from the agency, without contacting the respondent. See CLRC Memorandum 2006-36, pp. 28-30 & Exhibit pp. 11-14. According to Mr. Lasken, this procedure may be both inefficient and unfair to the respondent. *Id.* Mr. Lasken suggested that OAH be required to consult the respondent before scheduling an administrative hearing. *Id.*; see also First Supplement to CLRC Memorandum 2006-36, pp. 2-3 & Exhibit pp. 6-9.

In response to this suggestion, the Commission decided to send a letter to the Director of OAH, urging OAH to reexamine the existing method of scheduling an administrative hearing. See CLRC Minutes (Oct. 2006), p. 4. The Commission has not yet received a response.

In 2007, Mr. Lasken reported that OAH had not changed its method of scheduling an administrative hearing. CLRC Memorandum 2007-48, Exhibit pp. 16-18. In his correspondence to OAH, he also alleged that the ex parte setting of a hearing date violates Government Code Section 11430.10 (which prohibits certain ex parte communications between agencies and presiding officers).

Whether or not the OAH procedure violates the cited Government Code section is not clear, and would appear to be a matter of statutory interpretation. Nor is it clear that the OAH procedure is inefficient, as Mr. Lasken suggests. OAH would probably be best able to judge what is the most efficient way for it to set hearing dates.

However, there is an inherent unfairness in scheduling all hearings to suit the schedule of the agency involved, while requiring that individual respondents request a continuance if there is a scheduling conflict.

The Commission has authority to pursue this matter under its authority to study administrative law, and should consider doing so.

Court Reporting in a Misdemeanor Case

Under Code of Civil Procedure Section 269(a)(2), court reporting of certain proceedings in a felony case is mandatory "on the order of the court, *or at the request of the prosecution, the defendant, or the attorney for the defendant*." (Emphasis added.) Under Section 269(a)(3), however, court reporting of the same proceedings in a misdemeanor or infraction case is mandatory only "on the order of the court."

In 2007, Thomas Heeter suggested amending Section 269 to require court reporting in a misdemeanor case "on the order of the court, *or at the request of the prosecution, the defendant, or the attorney for the defendant*." CLRC Memorandum 2007-48, Exhibit p. 13 (emphasis added).

Based on the Commission's previous work on court reporting, the staff believes that this suggestion would be controversial and not likely to be enacted. CLRC Memorandum 2007-48, p. 29. In addition, the serious state budget crisis would weigh against any reform that adds new procedural costs.

If the Commission is inclined to pursue this suggestion, it would need to obtain authority from the Legislature before undertaking the suggested study. **The Commission needs to decide whether to seek this authority.**

SUGGESTED NEW TOPICS

During the past year, the Commission received only a few new topic suggestions appropriate for the Commission's consideration. These are analyzed below.

Probate Code

One of the new suggestions relates to probate and could be studied under our existing authority.

Removal of Executor

A new suggestion has been presented to the Commission by the State Bar Trusts and Estates Executive Committee (TEXCOM), in conjunction with the Commission's *Donative Transfer Restrictions* study. See CLRC Memorandum 2008-36, p. 20. Although the Commission decided not to incorporate the suggestion in the *Donative Transfer Restrictions* recommendation, it agreed to

consider the suggestion as a possible new topic for study in 2009. CLRC Minutes (September 2008), p. 7.

Probate Code Section 15642(b)(6) provides (with certain specified exceptions) for court removal of a trustee, if the trustee is a person to whom a donative transfer would be subject to the presumption of undue influence set forth in Probate Code Section 21350.

TEXCOM notes there is no statutory provision equivalent to Section 15642(b)(6) that provides for removal of a similarly situated executor of a will. TEXCOM believes that the two situations are parallel, and suggests that Probate Code Section 8502 (governing removal of a personal representative) should be revised to authorize removal under such circumstances.

This study would logically follow from the Commission's recommendation on *Donative Transfer Restrictions*, and could likely be completed in time to introduce legislation in 2010.

The staff recommends that the Commission consider studying this matter in 2009.

Real and Personal Property

One of the new suggestions relates to title to real property and could be studied under our existing authority.

Expiration of Options in a Recorded Deed of Trust

John Quirk suggests certain revisions to Civil Code Section 884.010, a section relating to an option to purchase real property that is referenced in a recorded deed of trust or other instrument. Exhibit, pp. 6-8.

Section 884.010 was drafted by the Commission, in conjunction with a Commission effort to "achieve greater marketability of title by removing the cloud on title created by obsolete interests of record." See *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401, 403 (1982). The Commission recommended therein that "provisions be added to California law to enable a person to rely on the record in determining marketability of real property burdened by an ancient mortgage or deed of trust of record." *Id*, at 410.

Section 884.010 provides:

> If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of

exercise or extends the option is recorded within the following times:

(a) Six months after the option expires according to its terms.

(b) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

One problem with Section 884.010, as indicated by Mr. Quirk, is that the section applies to a recorded instrument *giving constructive notice* of an option to purchase real property, but does not require that the *option itself* be recorded. Consequently, an option may have an expiration date that is not stated in the recorded instrument. To determine the expiration date of the option, it would be necessary to find the off-record instrument creating the option. That would largely defeat the purpose of the provision.

Mr. Quirk proposed that the section be revised to provide that the expiration date of the option is only relevant to determining the enforceability of the option if the expiration date is ascertainable from the recorded instrument. That approach would be very similar to the approach used in Section 882.020, which provides a parallel rule for expiration of a lien of a mortgage, deed of trust or other instrument creating a security interest of record in real property. Under that section, which was also recommended by the Commission, the expiration date of the lien must be ascertainable from the recorded instrument.

The problem pointed out by Mr. Quirk seems real and should be relatively easy to address. It relates directly to a provision enacted on the Commission's recommendation, and the problem he identifies may have resulted from a Commission drafting oversight. **The staff believes that this proposal would be a good candidate for study in 2009.**

Neighboring Property

Attorney Bryan R. R. Whipple of Tomales suggests that it would be helpful to modernize and codify the law governing the rights and duties of neighboring property owners with respect to fence maintenance and encroaching roots and limbs. See Exhibit p. 11. Mr. Whipple's main concern seems to be that the law on these issues, which is of frequent concern to citizens, may be antiquated or hard for a layperson to understand.

The staff is not aware of any serious problems with the law in these areas. Some self-help resources already exist for those who have question involving

fences and trees. For example, Nolo Press publishes *Neighbor Law: Fences, Trees, Boundaries, and Noise*, which describes California law on these issues.

Without clearer evidence that existing law is creating problems, the staff would recommend against commencing a study on this topic.

Civil Procedure

Two of the new suggestions relate to matters of civil procedure that are not within the Commission's existing authority.

Mandatory Use of Facsimile Numbers

Gerald Genard suggests that civil practitioners should be required to list facsimile numbers on pleadings, and allow legal notices to be sent to them by facsimile transmission in lieu of regular mail. Exhibit, p. 4. Mr. Genard believes that requiring regular mail for serving copies of filed documents is "inefficient, expensive, environmentally wasteful, and lends itself to games playing by less ethical lawyers."

Cod of Civil Procedure Section 1013(e) presently permits serving copies of filed documents via facsimile transmission, but only if the recipient consents to receiving service in this manner. Requiring all practitioners to accept such service would mean that all civil litigants (including in propria persona litigants) would need to obtain fax service as a precondition to litigation.

Such a proposal may be better addressed by the Judicial Council, and this suggestion has been made to Mr. Genard. In addition, in order for the Commission to pursue this matter relating to general civil procedure, it would need to request authority to do so from the Legislature. **The staff does not recommend that the Commission study this proposal at this time.**

Preparation of Law and Motion Orders

Mr. Genard also suggests that orders in law and motion proceedings be prepared by the judge that rules on the motion, rather than by the court clerk, or by the prevailing party under Rule of Court 3.1312. Exhibit, p. 5. Mr. Genard argues that preparation by the court clerk results in a document that isn't signed or file stamped, preparation by the prevailing party allows for unfair drafting, and preparation by both is duplicative and wasteful. He suggests that the judge's proposed order should be mailed to all parties, with all being given an opportunity to object to the wording, and the court given an opportunity to correct the order if it deems it appropriate to do so.

The staff suggests, and has suggested to Mr. Genard, that this proposal also be directed to the Judicial Council. **The staff does not recommend that the Commission study this proposal at this time.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during 2009. Completion of prospective recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to projects for which a consultant has delivered a background study, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

Legislative Program for 2009

The Commission's report on donative transfer restrictions is due by January 1, 2009. If the Commission finalizes its report on time, the proposed legislation will be ready for introduction in 2009.

In addition, the Commission's proposed nonsubstantive reorganization of mechanics lien law and its proposed technical reform relating to recording technology could be reintroduced in 2009. See Memorandum 2008-44.

Depending on the feedback we receive from interested parties, the reorganization of the Davis-Stirling Act might also be ready for reintroduction in 2009.

The Legislature's Priorities

In addition to the study of donative transfer restrictions, several other studies assigned by the Legislature should receive priority in the coming year.

Nonsubstantive Reorganization of Weapon Statutes

The Commission's report on nonsubstantive reorganization of the deadly weapons statutes is due by July 1, 2009. This is a huge project and the Commission obviously will need to give it priority to meet the deadline.

Post-Death Attorney-Client Privilege

The Commission's report on whether and to what extent the attorney-client privilege should survive the client's death is due by July 1, 2009. Again, the Commission will need to give this matter priority to be able to meet the deadline.

Remaining Trial Court Restructuring Issues

The original deadline for the Commission's report on trial court restructuring was January 1, 2002. That deadline was removed after the Commission submitted a major legislative proposal on the topic and requested authority to continue to do cleanup work in the area.

Although the statute directing the Commission's study no longer includes a deadline, we can infer from the original deadline that the Legislature expects the Commission to promptly address issues relating to trial court restructuring once they are ripe for action. Since removal of the deadline, three more bills have been enacted on Commission recommendation. The Commission's work on this topic should continue to receive high priority.

Consultant Studies

For some ongoing studies, the Commission has the benefit of a consultant's assistance:

Common Interest Development Law

This is a very large project. Prof. Susan French of UCLA Law School prepared a background study for the Commission. The Commission has received a long list of proposed reforms to CID law and has made a commitment to continue working on this topic. The staff believes that the following subjects would be good candidates for new work on this topic:

(1) *Simplify governance procedures for small homeowner associations.* This work could proceed in segments, which would make it more manageable. Although some possible reforms could be controversial, there is a real opportunity to benefit those who live in small homeowner associations, saving them time and money.

(2) *Exempt nonresidential CIDs from most of the Davis-Stirling Act.* Commercial unit owners arguably do not need (or want) the quasi-governmental protections of the Davis-Stirling Act. They are business actors who are comfortable operating within the traditional business structures established by the Corporations Code. This should be a relatively simple project, which would involve none of the usual political complications inherent in CID

projects (because homeowners would be entirely unaffected). The staff expects that this work would be very helpful to the business and real estate community and would significantly reduce hassles and costs.

(3) *Examine the application of the Davis-Stirling Act to other circumstances that are out of the mainstream.* For example: a stock cooperative without a declaration, a homeowner association organized as a for-profit association, and a subdivision with a mandatory road maintenance association that is not technically a CID.

Discovery Improvements From Other Jurisdictions

The Commission has made progress on civil discovery, but it has gotten many suggestions from interested persons that it has not yet considered. Prof. Weber's background study covers numerous issues. Although the Commission made preliminary decisions regarding which issues to pursue, it has not yet addressed most of the ones it selected. Although existing staff resource priorities will likely prevent any work on this study in 2009, it should remain a priority.

Review of the California Evidence Code

Prof. Méndez of Stanford Law School is available to assist the Commission in studying the evidence issues discussed in the articles he prepared for the Commission. As discussed above, the staff has compiled a list of specific evidence issues for possible study, which appear likely to be relatively noncontroversial. See CLRC Memorandum 2006-36, Exhibit pp. 70-71. The staff will seek further guidance from the Judiciary Committees regarding whether to pursue those issues.

Other Activated Topics

Apart from the 2009 legislative program, legislatively set priorities, and projects for which the Commission has assistance of a consultant, the Commission has also commenced work on attorney's fees, which it had to interrupt when other projects became more pressing. The Commission should turn back to that work when staff resources permit.

The Commission has also done considerable work on mechanics lien law, and has identified further topics that might be studied. Considering the possibility that the recommendation to entirely recodify mechanics lien statutory law will be reintroduced in 2009, it would not be a good time to begin new substantive work on this topic.

CONCLUSION

The staff recommends following the traditional scheme of Commission priorities:

(1) Matters for the next legislative session,
(2) Matters directed by the Legislature,
(3) Matters for which the Commission has an expert consultant, and
(4) Other matters that have been previously activated but not completed.

Projects falling within each of these categories are identified above and are already included in the Commission's Calendar of Topics.

Those priority matters will consume much of the Commission's time and resources in 2009, especially the first half of 2009, but it should be possible to undertake some new studies as well.

Possible New Topics

As discussed above, the Commission decided in 2007 to study the clarification of the statutes governing venue in a civil case. Authority to do so was added to the Commission's Calendar of Topics in 2007. Unfortunately, the existing allocation of staff resources probably precludes beginning work on this topic in 2009. The Commission may be able to do so in 2010.

The Commission should instead choose from among the other new topic suggestions that were carried over from last year or proposed in 2008. **In choosing between those topics, the staff recommends that the Commission focus on projects that are relatively small in scope and are mostly noncontroversial.** Given the very tight state budget situation and the recent history of legislative resistance to large recodification proposals, it would be best to concentrate on projects that will be fairly quick to complete, easy to enact, and that will provide a clear substantive benefit.

Based on that approach, the staff would recommend that the Commission consider activating the following new topics:

(1) *Provide for removal of an executor who is a "disqualified person" under the Donative Transfer Restriction Statute.* If it were not for the time constraints applicable to the Donative Transfer Restriction study, this matter would probably have been addressed in that study. It should be straightforward, noncontroversial, and require little expenditure of resources.

(2) *Improve the provision governing expiration of unexercised options to buy real property.* This topic is narrow in scope, and involves a provision that was drafted by the Commission.

Notwithstanding those recommendations, the Commission could also choose any of the following topics:

- *A narrow study of electronic filing of instructions to a sheriff regarding enforcement of a judgment.* If the Commission is interested in this topic, the staff would prefer to study it as part of a larger review of electronic filings to government officials. A larger study would provide a much greater benefit to the state and would allow for the development of a uniform approach. A broader study would require new authority from the Legislature, as noted below.
- *Address issues arising when settlor of revocable trust becomes incompetent.* The Commission could probably do useful work on this topic, but the fact that the matter has not been pursued by TEXCOM suggests that it is not seen as a priority among practitioners.
- *Examine the Uniform Custodial Trust Act for possible adoption.* This would be within our existing authority, but is liable to be technically complex and lengthy.
- *Issues relating to renewal of judgment.* We have some experience in this area that would help in completing a study. But the issues are very narrow and technical, and may not be a high priority at this time.
- *Scheduling of OAH hearings.* This presents a narrow question, in an area where the Commission has done considerable work. However, it may not be the best time to pursue a study that could impose new costs on state agencies.

Changes to Calendar of Topics

Looking ahead to 2010 and beyond, the Commission should decide whether to request new legislative authority.

The staff believes that there would be a benefit to studying the electronic submission of documents to government agencies. If the Commission is interested in this topic, we could request the necessary authority.

It might also be helpful to study whether residency requirements for licensed professions should be deleted from the law as unconstitutional. If the Commission is interested in studying that topic, we could request authority to do so.

The staff is not inclined to request authority to study the counting of days in civil procedure. Although clarification of the issue would be helpful, it may be

too political a topic for the Commission to make much progress. In light of the many topics on which the Commission could be productive, the staff is reluctant to take on a new project that is less likely to produce useful results.

The Commission should consider requesting removal of its authority to study offers of compromise. The original impetus for obtaining the authority seems to have been addressed by subsequent case law, and there are no other matters that the Commission has identified for study under that authority.

Recap of Recommended Program of Work for 2009

The staff has recommended that the Commission work on the following topics in the remainder of 2008 and 2009:

(1) Complete work on donative transfer restrictions, by January 1, 2009.
(2) Complete work on deadly weapons, by July 1, 2009.
(3) Complete work on attorney-client privilege after the client's death, by July 1, 2009.
(4) Continue work on the recodification of the Davis-Stirling Act.
(5) Continue work on trial court restructuring.
(6) Begin work on new CID law topics.
(7) Provide for removal of executor who is "disqualified person" under the Donative Transfer Restriction Statute.
(8) Adjust the provision on the expiration of a recorded option to purchase real property, to make the expiration date entirely determinable from the record.

Respectfully submitted,

Steve Cohen
Staff Counsel

Brian Hebert
Executive Secretary

CALENDAR OF TOPICS AUTHORIZED FOR STUDY

The Commission's calendar of topics authorized for study includes the subjects listed below. Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see ACR 35 (Evans), enacted as 2007 Cal. Stat. res. ch. 100.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and personal property. Whether the law should be revised that relates to real and personal property including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restriction on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon assignment, subletting, termination, or abandonment of a lease, and related matters.

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.

5. Offers of compromise. Whether the law relating to offers of compromise should be revised.

6. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

7. Special assessments for public improvements. Whether the acts governing special assessments for public improvement should be simplified and unified.

8. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

9. Evidence. Whether the Evidence Code should be revised.

10. Alternative dispute resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

11. Administrative law. Whether there should be changes to administrative law.

12. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigant should be revised.

13. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

14. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

15. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

16. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine to what extent they should be subject to regulation.

17. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

18. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in

public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

19. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

20. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

21. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or part, and related matters.

22. Venue. Whether the law governing the place of trial in a civil case should be revised.

EMAIL NO. 1 FROM GERALD H. GENARD
(JUNE 24, 2008)

I'm an inactive lawyer interested in improving California law. I suggest that civil procedure be changed ASAP to require lawyers to list Fax numbers on their pleadings and to allow notices in legal proceedings to be sent to them by signed fax in lieu of regular mail. A fax record showing the sender that the message has been received by another fax machine should be sufficient proof of service.

Requiring regular mail for service of copies of documents filed with the courts is inefficient, expensive, environmentally wasteful and lends itself to games playing by less ethical lawyers.

Gerald H. Genard
Danville, California

EMAIL NO. 2 FROM GERALD H. GENARD
(JUNE 24, 2008)

I propose the following change in the law:

A minute order is a court's answer to a party's request made by a motion. A minute order is a court's answer to, or ruling on, a motion. Typically, the court's clerk actually types up the minute order. Because the court creates the document, it generally isn't signed and file stamped. Rather than having the court clerk write up the minute order, some jurisdictions will have one of the attorneys produce a written order summarizing the court's ruling or rulings for approval by the other party and judge. California courts often do both.

This makes no sense and results in a wasteful duplication of orders, extra time and expense to courts and litigants and might be, at times, an invitation to some lawyers to slant the draft orders in ways unfairly favorable to their clients. This might be a particularly troubling problem where one of the litigants appears in propria persona, as frequently occurs in family law matters.

The law should be changed to require that the courts rule on motion by minute order and that copies of the order be sent to the parties. Each party should then be given a brief period of time to make specific objection to the wording of the order and if the objection has merit, the court may correct the order. There should be no requirement for either party to draft a separate order for the judge's signature.

Gerald H. Genard

Danville, Ca.

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October 6, 2008

***Via E-Mail Only** [bhebert@clrc.ca.gov]*

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Attention: Brian Hebert

Re: Proposed Revision to Civil Code section 884.010
Marketable Record Title Act—Unexercised Options

Dear Mr. Hebert:

Giving the subject more thought over the weekend, I believe there is a further troubling aspect of existing section 884.010 which, however (unlike the question whether review of matter outside the official record is necessary to application of the section), has not as yet actually arisen in my practice. This further subject concerns the manner in which recording an instrument extending an option affects application of the section.

As in my letter of October 2, I will discuss below in (1) what I believe to be the problem presented by existing language of section 884.010 concerning review of matter outside official records and (2) an analogous difficulty presented by previous language of section 882.020 (Ancient Deeds of Trust). However, I have added here in (3) a discussion of the further subject concerning the recording of an extension and included in (4) both the previously suggested change to section 884.010 regarding the matter previously raised and further suggested revisions to address this further subject. I intend this letter to entirely supersede my letter of October 2, leaving it to you and the Commission to determine whether and to what extent there is a need to pursue either or both of these subjects.

(1) The problem with existing language of section 884.010 concerning review of matter outside the record

The overall objective of the Marketable Record Title Act is "to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, with respect to the property interests specified in this title" by clearing from record title "[i]nterests in real property and defects in titles created at remote times, whether or not of record, [which] often constitute unreasonable

restraints on alienation and marketability of real property because the interests are no longer valid or have been abandoned or have otherwise become obsolete." (Civil Code § 880.020.)

Section 884.010 represents an effort to advance the overall objectives of the Act in respect to "Unexercised Options." This is achieved by providing for expiration "of record" of an option (the effect of which expiration is provided in section 884.020) in the absence of specified events during a prescribed six-month period. However, the events and source of information which will determine under the Act when the relevant six-month period commences make it difficult to rely upon the ameliorating effect of the Act in this regard.

The present text of section 884.010 is as follows.

> § 884.010. Expiration date; recorded instrument. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:
>
> (a) Six months after the option expires according to its terms.
>
> (b) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

The difficulty is that, although the section expressly recognizes that an option may be placed of record through recording of a short form or memorandum of the option (which "gives constructive notice" of same), it does not take into account that it is not always possible to determine the expiration date of an option (or even whether there is such an expiration date) from the face of a recorded memorandum. In my experience, reviewing title to California real property over the past 30 years, recorded memoranda of options frequently do not include that information. When the relevant information does not expressly appear in the recorded document, the existing language of the section can be interpreted to require access to the unrecorded "long form" of an option agreement in order to determine the operation of the section.

As I mentioned when we talked last week, my present inquiry to you is the result of my having encountered just such a recorded memorandum of option in the course of title review for a client during the past week.

(2) The analogous difficulty in previous language of section 882.020

An analogous situation arose from the original language of section 882.020, providing for expiration of record of ancient mortgages and deeds of trust. The original language of the relevant portions of that section was as follows:

§ 882.020. Expiration date; lien of security interest of record; power of sale deemed exercised. (a) Unless the lien of a mortgage, deed of trust, or other instrument that creates a security interest of record in real property to secure a debt or other obligation has earlier expired pursuant to Section 2911, the lien expires at, and is not enforceable by action for foreclosure commenced, power of sale exercised, or any other means asserted after, the later of the following times:

(1) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the record, 10 years after that date.

(2) If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the record, or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, 60 years after the date the instrument that created the security interest was recorded.

(3) If a notice of intent to preserve the security interest is recorded within the time prescribed in paragraph (1) or (2), 10 years after the date the notice is recorded. [Emphasis added.]

* * * * *

Two decisions held that the phrase "not ascertainable from the record" in these provisions requires that the relevant date appear on the face of the recorded document, and does not include information in unrecorded documents which are merely referred to in the document of record. (*Miller v. Provost* (1994) 26 Cal.App.4th 1703; *Nicopulos v. Superior Court* (2003) 106 Cal.App.4th 304.) In 2006, the language of Section 882.020, subsections (a)(1) and (a)(2), was amended, substituting the phrase "ascertainable from the recorded evidence of indebtedness" for the prior phrase "ascertainable from the record," in order to clearly express a legislative intent consistent with those two appellate decisions.

(3) The problem with existing language of section 884.010 concerning the impact of recording an extension

As already noted, the present text of section 884.010 is as follows.

§ 884.010. Expiration date; recorded instrument. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times:

(a) Six months after the option expires according to its terms.

(b) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

The express recognition that an instrument extending the option may be recorded leaves at least two significant questions unanswered: *first*, what is the effect upon operation of the statute from recording such an extension and, *second*, whether matter outside the record must be reviewed if, for example, a memorandum of extension is recorded from which the expiration of the extended option period cannot be determined.

There is also the third question of whether the statute intends to permit only a single such extension (as appears to be the case in regard to mortgages and deeds of trust in section 882.020(a)(3)) or to allow any number of such extensions (as seems to be the case regarding mineral rights in section 883.220 and easements in section 887.050). In both of the latter examples a legal action is required to "clear title," while in regard to options the existing language (as in the case of mortgages and deeds of trust) is self-effecting. For this reason, the change suggested below assumes a single allowed extension (leaving the parties free of course to make and record a further option agreement in order to achieve the practical affect of a further extension).

(4) The proposed changes to section 884.010

As in my letter of October 2, the change which I am proposing to section 884.010 in regard to whether review of matter outside the official record is necessary is roughly comparable to that made in 2006 to section 882.020. The further change here proposed in regard to application of the section after recording evidence of an extension is also derived in concept from the existing language of section 882.020. The changes here proposed (additions in underline and ~~deletions in strike through~~) are set forth below:

§ 884.010. Expiration date; recorded instrument. If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise ~~or extends~~ of the option is recorded within the following times:

(a) If the expiration date of the option is ascertainable from the recorded evidence of the option, six months after the option expires according to its terms.

(b) If the option provides no expiration date, or if the expiration date of the option is not ascertainable from the recorded evidence of the

option, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

(c) If within the time prescribed in paragraph (a) or (b), whichever is relevant, an instrument is recorded which extends the expiration date of the option to a specific date which is ascertainable from the recorded evidence of that extension, six months after the extended option period expires according to the terms of that recorded evidence of the extension. Only one such extension is permitted hereunder, provided that the parties remain free to make and record evidence of a further option agreement at any time before or after expiration of a previous option agreement.

Thank you, again, for your patience with this. Please let me know if there are any questions concerning this subject, or if there is any action I may take to assist the Commission in evaluating and acting on this proposal.

Very truly yours,

John Quirk

JQ:sb

EMAIL FROM BRYAN R. R. WHIPPLE
(3/13/2008)

Dear Ms. Gaal:

I'm writing you because your e-mail address was the easiest among the members to carry in memory between your Web site's "Contact Us" page and my Outlook Express. Oddly, it is possible to address an idea to a single member, but not to the Commission as a whole via this page.

Anyway, I thought I'd offer a suggestion.

Civil Code section 841(2) addresses the duties of coterminous neighbors to build and maintain the fences between them. It was part of the original 1872 code and hasn't been amended since.

As an attorney who answers many questions on the LawGuru Web site (more than 1,000 a year), I am struck by the frequency of questions reading, for example, "The fence between us was old and rotten, it blew over in last week's storm, and..... (insert your own concluding phrase):

(1) .....my neighbor refuses to help pay for it!"

(2) .....my neighbor wants to put in a gold-plated fence and expects me to pay half!"

etc.

I have to explain to them that the duty to pay half depends upon whether the party has completely enclosed his/her property with fencing or the equivalent (hedges, buildings) or whether there is an opening on one side or another; further, that the quality and hence the expense of fence that must be cost-shared is not mentioned in the law.

This law was obviously written for an era when our state was largely rural and fences were used to keep animals in if you raised livestock and to keep them out if you were growing crops. It does not speak to city and suburb dwellers' needs.

What would modernize the law? I don't know (that's your department, or the legislature's). In Michigan, where I grew up, urban property owners maintained boundary fences on the north or west side, and the other guy, of necessity, took care of the south or east. Works with rectangular lots.

Another one that causes a lot of hard-to-answer questions is the overhanging limbs - invasive roots issue.

(Cf. Civil Code sections 833 and 834). There is no statute on point; the leading case says only (to paraphrase) "it's OK to cut the invasive roots or limbs at the property line, so long as it's done in a non-negligent manner" (Bonde v. Bishop (1952) 112 Cal.App.2d 1, citing 19th-Century precedent), apparently creating an exception to the policy against self-help in trespass cases and leaving uncertain the question of whether the trespassee/plaintiff is entitled to money damages for the cost to perform the pruning. Apparently "non-negligent manner" (paraphrased) means in a way that doesn't kill the tree, or render it likely to topple in a windstorm.

Thanks for taking a look,

Bryan R. R. Whipple, SBN 203076